THE COMMITTEE ON ENERGY AND COMMERCE

INTERNAL MEMORANDUM

April 4, 2011

To: Energy and Commerce Committee Members

From: Majority Staff

Re: Hearing on Medical Liability Reform

On April 6, 2011, at 9:30 a.m. in 2123 Rayburn House Office Building, the Subcommittee on Health will hold a hearing entitled, "The Cost of the Medical Liability System and Proposals for Reform, including H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011." At the hearing, the Subcommittee will examine the nation's medical liability system and approaches for reform. The following provides background on the nation's medical liability system.

I. WITNESSES[1]

Lisa M. Hollier, MD, MPH
Fellow, American College of Obstetricians and Gynecologists
Professor and Director, Lyndon B. Johnson Residency Program, University of Texas Medical School at Houston

Allen B. Kachalia, MD, JD
Medical Director of Quality and Safety
Brigham and Women's Hospital
Harvard Medical School

Troy M. Tippetts, MD
Past President, American Association of Neurological Surgeons
Past President, Florida Medical Association

II. MEDICAL LIABILITY REFORM

This section provides background on the current medical liability system, examples of successful reform efforts, and comprehensive medical liability legislation.

A. Medical Liability System

Many have argued for years that America's medical liability system is in crisis. If the root of any problems with the nation's health care is cost – that providing the best health care in

[1] Additional witnesses maybe added.

the world has become too expensive – then the burdens imposed by medical liability pose an extremely significant part of the problem. This is largely due to the practice of defensive medicine, which is the ordering of additional and often redundant tests and services to prevent future litigation.

Indeed, a study by the Massachusetts Medical Society found that 83% of the physicians surveyed reported practicing defensive medicine, and that an average of 18% to 28% of tests, procedures, referrals, and consultations, and 13% of hospitalizations, were ordered for defensive reasons. Some have estimated that defensive medicine costs our nation up to $200 billion a year. According to the Congressional Budget Office's recent publication, *Reducing the Deficit: Spending and Revenue Options*, comprehensive medical liability reform would reduce the budget deficit by $62 billion over 10 years.[2]

Medical liability also has an effect on the general economy. By contributing to rising health care costs, frivolous lawsuits make it even more difficult for businesses to remain profitable and for employers to create jobs.

President Obama has expressed his support for meaningful liability reform. Before passage of the Patient Protection and Affordable Care Act (PPACA), President Obama acknowledged in a speech to the American Medical Association that defensive medicine leads to more tests and needless costs because doctors must protect themselves from frivolous lawsuits. During his speech to the Joint Session of Congress in September 2009, President Obama said that "I don't believe malpractice reform is a silver bullet, but I've talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs." In his most recent State of the Union address, President Obama again included medical liability reform as part of his agenda.[3]

Section 10607 of PPACA authorized $50 million over five years for the Secretary of Health and Human Services (HHS) to make grants to states for the development, implementation, and evaluation of alternatives to current tort litigation. The section also requires the Secretary, when reviewing a state's grant application, to consult with a new review panel, which must include trial lawyers. Many Members do not believe that throwing $50 million at this issue will solve the problem, and in fact the Congressional Budget Office did not attribute any savings to the government because of this proposal.

B. Examples of Successful Reform Efforts

Some states have adopted comprehensive medical liability reforms, which include caps on non-economic damages, and reported tremendous results. Two examples are Texas and California.

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[2] The Congressional Budget Office document is available at the following link: http://www.cbo.gov/ftpdocs/120xx/doc12085/03-10-ReducingTheDeficit.pdf.

[3] In his January 25, 2011, State of the Union address, President Obama specifically called for "medical malpractice reform to rein in frivolous lawsuits." On January 27, Republicans on the Committee wrote directly to the President seeking his leadership in crafting such legislation. There has been no response from the administration.

Texas adopted comprehensive reform, including caps on non-economic damages, in 2003, and these reforms have yielded remarkable outcomes, including an increase in new physicians, additional obstetricians, and reduced medical liability premiums. From 2003 through 2009, the Texas Medical Board saw an increase of roughly 60% in their new physician licensure applications. While other states were losing obstetricians, Texas actually gained obstetricians. The number of obstetricians in Texas increased by 218 between 2002 and 2009 to a total of 2,444. Finally, doctors in Texas saw their medical liability insurance rates decrease by over 40% from 2004 through January 2011.

California enacted comprehensive reform, the Medical Injury Compensation Reform Act (MICRA) in 1975. MICRA included caps on non-economic damages, limits on trial lawyer contingency fees, periodic payment of future damages and introduction of collateral source evidence. From 1976 to 2009, while medical liability insurance premiums in the other 49 states rose a total of 945%, those in California only increased by 261%.

C. Comprehensive Medical Liability Legislation

The Judiciary Committee reported H.R. 5 on March 17, 2011. H.R 5 mirrors the provisions of MICRA and includes the following provisions:

- H.R. 5 would require a plaintiff to file a lawsuit within 3 years of the manifestation of injury or 1 year after the claimant discovered the injury, whichever occurs first.

- H.R. 5 would enable a plaintiff to recover his or her full economic loss, but it would limit a plaintiff from recovering more than $250,000 in non-economic damages. H.R. 5 also would establish a fair share rule that apportions damages based on a defendant's degree of fault.

- H.R. 5 would establish sliding scale limits on attorney contingency fees.

- H.R. 5 would allow a party to introduce evidence of collateral source benefits to prevent double recovery.

- H.R. 5 would set standards for the award of punitive damages, including a limit on the amount of punitive damages to two times the amount of economic damages awarded or $250,000, whichever is greater. Punitive damages are not intended to compensate the injured party but rather punish malicious behavior. H.R. 5 would limit punitive damages to instances where a person acted with malicious intent or deliberately failed to avoid injury that was substantially certain to occur.

- H.R. 5 would allow courts to require periodic payments of damage awards.

- H.R. 5 would not preempt any state statutory limit on the amount of compensatory or punitive damages (or the total amount of damages) awarded in a health care lawsuit.

III. CONCLUSION

Should you have any questions regarding the hearing, please contact John O'Shea or Clay Alspach at (202) 225-2927.